PETITION FOR WRIT OF CERTIORARI.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

vs.

JOHN C. WARNER, RESPONDENT.

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

Filed ..... 1895.

..... Clerk.

A. W. Hyatt Stat'y & Pr. Co., N. O.—1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF JOHN G. WARNER, APPELLANT, VS. THE CITY OF NEW ORLEANS, APPELLEE, NO. 691, NOVEMBER TERM, 1897.

To the Honorable the Supreme Court of the United States:

The petition of the City of New Orleans, respectfully shows:

1. That it is a municipal corporation, created by the acts of the general assembly of the State of Louisiana, No. 20, of the session of 1882, and No. 45, of the session of 1896, and a citizen of said state.

2. That on November 26th, 1894, John G. Warner, a citizen of the State of New York, in the Circuit Court of the United States for the Eastern District of Louisiana, brought his bill in his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind as himself, to charge petitioner as the debtor of certain taxes averred to have been levied by lawful authority, for the payment of certain warrants, the collection of which was made the duty of petitioner, by certain statutes, hereinafter more particularly described; that the liability of the city was averred, as the result of a certain contract which it was alleged she had broken, and her asserted disregard and violation, of certain duties imposed upon her by statute, as to the prosecution of certain work of drainage, and the collection of taxes aforesaid.

3. That it was averred by the bill, that by Act No. 165 of March 5th, 1858, the legislature of the State of Louisiana provided for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson, which for such purpose were divided into three draining districts, to which, by a subsequent act of said legislature, a fourth draining district was added; that the appointment of a Board of Commissioners was provided for each district, who were invested with all rights and powers necessary to drain the same; that said boards were authorized to cause plans of said districts to be made, designating the limits of the sections or districts to be drained, the subdivisions of property therein contained, and the names of the proprietors; also, the dimensions and directions of the canals to be dug, and the places where pumping engines were to be placed; that upon completion, these plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted, in French and English, in two newspapers, for a stated period, announcing that the commissioners would proceed to drain such section, defining the limits thereof, and indicating as nearly as possible when the draining thereof would complete, and also the possible cost of the work; that after publication had been made for a designated period, the commissioners were directed to apply by petition to a court in the parish of Orleans, for that portion of the section or district lying within that parish, and to the district court for the parish of Jefferson, for that portion of the section or district lying within that parish; which courts were directed, upon due proof being made of the publications or notices, to decree that each portion of the property situated within said limits was subject to a first mortgage, lien or privilege, in favor of the commissioners, for such an amount as might be assessed against said section or district, and interest thereon at 6 per cent. per annum from demand; that the said decrees should be recorded, by the recorders of mortgages for the parishes of Orleans and Jefferson, which lien, privilege and first mortgage, it was declared, should take precedence over all other mortgages, liens or privileges whatsoever, whether tacit, conventional, legal or judicial.

4. That the said commissioners were given authority to levy such uniform assessment or assessments, upon the superficial or square foot of lands situated within their respective draining districts or sections, to defray the expenses of the construction of levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of the act; that it was further provided, that on the non-payment of said assessments, judgments should be recoverable, before any court of competent jurisdiction, and the lands assessed should be sold, according to law.

5. That by Act No. 191 of the general assembly of the State

of Louisiana, approved March 17th, 1859, provision was made for the issue of bonds, designated as "Draining Bonds," in order to carry into effect the provisions of Act No. 165 of 1858; that upon the issuance of the bonds, the Board of Commissioners should fix and determine the amount of the assessment, to be levied upon the superficial or square foot of the lands situated within the draining district of each board, in accordance with the act of 1858, and to fix and apportion the amount to be paid yearly by the owners of said lands, in order to pay the interest on said bonds as might mature, and the manner of redeeming such bonds, was provided for in other sections of said act of 1859.

6. The bill further recites, that by the act of the legislature of the State of Louisiana No. 57 of 1861, entitled "An Act to Provide for the Collection of the Assessments for Drainage, Under the Acts of March 18th, 1858, and the Supplementary Act thereto of March 17th, 1859," it was enacted, that the amount of assessments levied as aforesaid, should be collected and sued for in the manner following: That as soon as any assessment had been made, notice thereof should be given, a copy filed in the Third District Court of New Orleans, for assessments on property within that parish, and in the Third Judicial District Court for the parish of Jefferson, for assessments made on property within that parish; that the said tableaux of assessments to be thus filed should set forth the amounts assessed, and the names of the owners of the lands, if known, and if the owners' names were unknown, the fact to be so stated; that a petition should be filed with the said assessment rolls, praying, and an order rendered thereon, that all persons whom it might concern should show cause, within thirty days from the first publication, if any they had, why said assessment rolls should not be approved and homologated, and that after due observance of this requirement, the said courts should, upon motion of counsel for the Boards of Commissioners, approve and homologate said assessment rolls, which should be a judgment against the property assessed, and the owners thereof, on which execution might issue, as on judgments rendered in the ordinary mode of proceedings.

7. That by the act of the legislature of the State of Louisiana, No. 30, of its session of 1871, the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing, and domiciled in the City of New Orleans, was authorized and empowered to excavate drainage canals and build protection levees within the limits of New Orleans and Carrollton, on the terms and condition expressed in said act, and authorizing said company to excavate all canals, and to build all levees, to be designated and fixed by the Board of Commissioners of the City of New Orleans, the said act itself pointing out in certain parts, how and by what means the work of drainage should be

executed by said company, and prescribing certain other details thereof; that by said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed for that purpose, to examine the work done by said company during each month, and certify to the same; that it was made the duty of the administrator of accounts, on presentation to him of said certificate, to draw a warrant on the adminstrator of finance, in payment of the work so done, at the rate of fifty cents per cubic yard for excavations, and fifty cents per cubic yard for levees built; that these warrants it was the duty of the administrator of finances to pay on presentation to him, in case there were any funds in the treasury to the credit of said company; but that in the absence thereof, in whole or in part, the said adminstrator was required to endorse upon each warrant not so paid, the date of its presentation; from which date it should bear interest at the rate of eight per cent. per annum, until paid.

That in order to provide funds for the payment of such work, the Boards of Commissioners for each one of the several districts aforesaid were directed to transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for damages, in their hands, or under their control, all titles to real estate, books, plans, tableaux and judgments in favor of the commissioners, the office furniture of the latter, a true statement of the claims of the commissioners against the City of New Orleans, to be adjudicated and settled out of money collected by the city, and pertaining to said drainage districts; and that the Board of Administrators should be and were thereby subrogated to all rights, powers and facilities, possessed by the commissioners of the several districts, and the said Board of Administrators were directed to collect from the holders of property within the districts the balance due on the assessments, as shown by the books, which the bill avers were thereby confirmed and made exigible; to make an assessment of two mills per superficial foot in those parts of the three existing drainage districts, and on such other lands as should be brought within the protection levees contemplated by said Act No. 30, of 1871, where no assessments had been made; and to execute and enforce the same, as provided by the several acts of the legislature creating and regulating said Boards of Commissioners; that all moneys so received from said commissioners, as well as by the collection of claims for drainage then due, and from the collection of assessments, and from any of the sources contemplated, should be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held as a fund applicable to the drainage of New Orleans and Carrollton; and that all property, not money, so received, should be held in trust for the payment of said company.

8. It is further set up in the bill, that in accordance with the

direction to that end contained in Act No. 30, of 1871, the Board of Administrators of the City of New Orleans, by ordinance, created the fourth drainage district, embracing lands not contained in any of the three districts established by the act of 1858.

9. Proceeding, the bill sets forth, that the Boards of Commissioners were duly appointed, qualified, and entered upon the discharge of their duties, and did all of the acts, such as the making of plans, procuring the homologation of the same, the levying of the assessment, and having the same homologated by judgment, in accordance with the provisions of the several statues hereinbefore mentioned.

10. The bill charges, that the Board of Administrators of the city, in compliance with Act No. 30, of 1871, took possession of all the moneys, rights and privileges described in said act, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all drainage warrants that might be issued under said act No. 30, of 1871; that the amount of the assessment handed over to the City of New Orleans, in the first and second districts, was $790,621.42; those in the third and fourth districts was $909,915.74; making a total of $1,699,637.16, of which there was assessed against the city herself, on streets and squares, as follows: in the first district $223,110.60, in the second district $199,885.47, in the third district $207,441.46, in the fourth district $65,956.77; that on these assessments there had been collected from individuals, by the City of New Orleans, between the time she took charge, as aforesaid, and the 7th of June, 1876—the date of the sale from Van Norden and the Canal Company to the city, thereafter referred to in the bill—in cash, $78,748.51, and in drainage warrants, paid in pursuance of ordinance 2460, annexed to the bill as part of is, $151,174.16, leaving outstanding and due, on the books, a balance of $1,499,714.47, including the said sums which the bill claims were due by the city herself on street and squares.

11. That on the 22d of May, 1872, the Canal Company, for a valuable consideration, assigned, transferred and set over, to Warner Van Norden, all its right, title and interest in and to the privileges and advantages granted it by the aforesaid act No. 30, of 1871; and by another act of sale, on November 22d, 1872, the company, for a valuable consideration, sold and delivered to said Van Norden all of its dredgeboats, derricks, flatboats, and other property used in dredging.

12. The bill then avers that from the time the said Board of Administrators took charge, in June, 1871, pursuant to said act of 1871, a vast amount of drainage work had been done by the Canal Company and Van Norden, its transferee; that twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and that a corresponding amount of protection levees were built; the

said work being in all respects conformable to the acts of the legislature, and the designs of the Board of Administrators, who duly approved and accepted the work; that to complete the entire system of drainage it was only necessary to complete a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on the lake shore, which was the duty of the city, under said Act No. 30, of 1871.

13. It is then averred by the bill, that by Act No. 16 of the legislature of Louisiana, approved March 24th, 1876, the city was authorized and empowered to contract with the Canal Company and Van Norden, as transferee thereof, for the purchase of the former's rights, franchises, tools, apparatus, implements, machines and boats, the purchase price to be paid in drainage warrants, payable out of drainage taxes, imposed under the several acts of the legislature hereinbefore set forth; and that after an appraisement, on the 7th of June, 1876, the said purchase was made, the city receiving from the said company and its transferee, the machinery, boats and other property of great value, for which it agreed to pay in drainage warrants three hundred thousand dollars, which were delivered to Van Norden, transferee, aforesaid; that complainant is the owner of three of said warrants, for the sum of two thousand dollars each; that the suit is brought thereon, as well as on the assignment, transfer and subrogation of Van Norden to complainant, of all his right, title and interest in and to said warrants, as well as of each and all rights of action which he had or has against the City of New Orleans, arising in his favor out of the said act of sale of June 7th, 1876, or the action of the City of New Orleans thereunder, by reason of its failure to collect said drainage taxes, or by reason of the city to complete the drainage work, to the end that said taxes might be collected.

14. The bill then recites, that the said Act No. 16, of 1876, providing for the payment of the purchase price of said dredgeboats, and other property, and by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new designation of said taxes by the legislature, which could not be diverted until said drainage warrants were fully paid, and placed said taxes beyond any claim that could be urged against them by the City of New Orleans, or by any other party or person whomsoever, especially as the city became the owner of said dredgeboats, fanchises and implements, without paying her own money or property, or giving any personal obligation therefor.

15. That after said purchase the city alone was possessed with sole power, as well as the necessary tools and outfit, to complete the necessary system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage; but that from the date of said purchase, in June,

1876, and notwithstanding said drainage work had, from the very commencement thereof, by the company, in 1871, and the prosecution thereof by Van Norden, as transferee, from May, 1872, been proceeded with with great vigor, and over two-thirds thereof had been completed, the city ceased all work on said system, and never thereafter commenced or completed any other, but sold some of the machinery so purchased, diverted the proceeds of taxes to other purposes than the payment of drainage warrants; and allowed others of said boats to sink or rot unused, and all notwithstanding that they were in first-class condition when received from the vendor; and thus rendered herself incapacitated for the completion of the drainage work aforesaid, or for any other work of drainage whatsoever; allowed the canals dug by said company and transferee to fill up, and to remain filled, with filth and sediment, thus becoming useless and worthless, and, in fact, destroyed a vast amount of work already done, to a very large extent.

16. The bill further sets out, that ever since its purchase the city had done nothing to compel or enforce the payment of drainage taxes, except to keep an office in the City Hall, where the agent of Van Norden might induce drainage taxpayers, by persuasion, to pay their taxes, where some were paid, but the amount unknown to complainant, and that the same had never been accounted for; that the city, by proclamation of its mayor, advised the taxpayers not to pay the taxes, and by reason of her conduct in not completing the system, nor adopting any other to drain the land, the Supreme Court of Louisiana, in Davidson vs. New Orleans, in March, 1882 (34th La. An. Rep., pp. 170 to 178), decided that the said taxes could not be collected, which decision from the date thereof, became the settled jurisprudence of the state, whereby large amounts of drainage taxes were cancelled, and that the remaining had become of little or no value; that the city, by report of a special committee of its council, pointed out to drainage taxpayers, how, under the Davidson decision, they might avoid payment thereof, which suggestion put forth by the city, while trustee of the said fund, and the collector thereof, had ever since been largely adopted and enforced, and large amounts of drainage taxes erased and lost in consequence thereof; that in suits brought by taxpayers for this purpose the city made no defense; that the city, by other ways and means unknown to complainant, destroyed said fund, until, so far as the courts of Louisiana were concerned, the same became unenforceable, and so, utterly worthless to the holders of the warrants given for the purchase of the dredgeboats, etc.; this express violation of the express covenant contained in said act of sale and purchase, not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of said drainage tax judgments, until all of said warrants should have been paid in full."

The bill proceeds, averring, that on some occasions the city had claimed the drainage taxes as her own property, and been allowed the full benefit thereof in payment of her own debts, especially in a certain suit, where, being sued for an indebtedness of the Commissioners of the City Park, in a large sum of money, she claimed said sum sued for, should be credited upon the drainage taxes, amounting to $25,725.96, assessed against another portion of the tract of land, concerning which the city was sued; that this offset was allowed, for which, with 6 per cent. per annum, from the date of its allowance, she should account to the warrant-holders; the bill then proceeds to vindicate the excellence of the plan according to which the work was to be done, which it charges, if carried out, would have protected the lands from overflow from without, and would have removed all drainage from within.

17. The twenty-fourth paragraph sets forth, that at the time of the sale by Van Norden and the Canal Company to the city, the drainage assessments then uncollected amounted to $1,469,715.41; that the city, after her said purchase, not only had all the necessary authority, outfit and equipment, to have completed the said system of drainage, or to have adopted or completed some other sufficient system that would have drained the lands, and made them available for the payment of the warrants given for the purchase aforesaid, but that she had likewise an unexhausted and unrestrained power of taxation, under which, by a tax on all the property within the City of New Orleans, she could have supplied herself with sufficient means to have completed said system, or any other system; but that, in violation of her duty, and in repudiation of her obligation, she abandoned all pretense of draining, in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that the said taxes were illegal and unconstitutional, by reason of certain acts of the legislature of Louisiana, all of which, the bill avers, were void, as repugnant to the Constitution of the United States, especially section 10, article 1, and the 14th amendment thereof; and at other times pretending that said taxes were uncollectible, because the lands were not worth the amounts imposed thereon; which complainant avers, was without foundation in fact, the only reason why the lands on which the taxes were levied were not worth the amount of the taxes being because the city had refused to drain them, either by completing the system, or keeping open and cleaning the canals already dug.

It is then charged, that by the said act of purchase of 1876 the city, in addition to the former duties imposed upon her, of trustee for the collection and payment of said taxes, became the voluntary and contractual trustee for the collection of taxes then due, and was bound to use her utmost authority for the collection of the same,

under the terms of the said sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid; thus having done everything in her power to destroy said taxes, and defeat their collection, notwithstanding various suits brought against her for her dereliction of duty in this regard, which suits are enumerated; that in consequence she had become accountable to complainant and other holders of drainage warrants, for all moneys collected and not paid to drainage warrant holders, for all moneys misapplied, and also for such sums as might have been collected, had the city done her duty in the premises, and which have become lost and wasted because of the said nonfulfillment of duty as voluntary and contractual trustee, between the time she took charge, in June, 1871, to the time a receiver was appointed, in June, 1891, especially between the date of the sale by Van Norden and the company, June 7th, 1876, to June 13th, 1891.

18. The matter contained in the twenty-sixth paragraph of the bill, as to complainant's anticipation that the city would plead its issue of certain bonds, in discharge of the liability sought to be fixed upon it, may be disposed of by a mere reference, as the answer to a certified question from the Court of Appeals to this Honorable Court, to be hereafter more particularly dealt with, renders this part of the bill unimportant for the present purpose.

19. On February 4th, 1895, defendant filed its demurrer to the bill, general and special; the points made by the said demurrer were:

First. A denial of the jurisdiction of the Circuit Court, on the ground that plaintiff suing, as the assignee of Van Norden, himself the assignee of the Canal Company, which was a citizen of the State of Louisiana, was incompetent to maintain a suit in the Circuit Court against the defendant, likewise a citizen of Louisiana, the act of Congress prohibiting such suit by the assignee of a chose in action, where the assignor could not maintain such a suit.

Second. That all the matters and things alleged in the bill, had been finally adjudged by the Circuit Court in the case of Peake vs. New Orleans, as also, on appeal, by the Supreme Court, as would appear by its decision in volume 139 of the United States Reports, p. 342.

On February 26th, 1895, the demurrer of the defendant was sustained, and the bill dismissed, at the costs of complainant; whereupon the case was carried by appeal to the Court of Appeals for the Fifth Circuit.

20. On May 14th, 1895, the Court of Appeals, upon a statement made by itself, requested the instruction of this Honorable Court upon two points, stated in the following questions:

First. Is the City of New Orleans, under the warranties, express or implied, contained in the contract of sale of June 7th, 1876, by

which she acquired the property and franchises from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge of her own liability to that fund on account of assessments on streets, public squares, etc.?

Second. Should the decision in the case of James W. Peake vs. City of New Orleans, 139 U. S., p. 342, be held to apply to the facts in this case, and operate to defeat the complainant's action?

The first of these questions this Honorable Court answered in the affirmative; the second it declined to answer.

Warner vs. New Orleans, 167 U. S., pp. 473-478.

On May 31st, 1897, the mandate of the Supreme Court was filed in the Court of Appeals; whereupon, on June 10th, 1897, the Court of Appeals reversed the decree of the Circuit Court, and remanded the cause, with instructions to overrule the demurrer, and thereafter proceed as equity and good conscience may require.

The opinion found in 81st Fed. Rep., p. 650, is based upon two grounds:

First. That the city is estopped from pleading her bond issue as a discharge of her obligation to account for drainage taxes collected on private property, and as a discharge of her own liability to that fund, as assessee of the streets and squares; citing Warner vs. New Orleans, 167 U. S. 467; thus following the answer of the Supreme Court to the first question certified.

Second. That on the case made by the bill, the decision of the Supreme Court in Peake vs. New Orleans, 139 U. S. 242, does not *necessarily* apply to the facts of the present case, nor operate to defeat the complainant's action.

The opinion then stating, that "it follows that the Circuit Court erred in sustaining the demurrer to the complainant's bill."

21. After the filing of the mandate of the Court of Appeals, on July 1st, 1897, and the entry of a decree by the Circuit Court, in accordance therewith, defendant, on October 30th, 1897, filed its answer, setting up specially the following defenses:

First—That the acts 166 of 1858, 191 of 1859, 57 of 1861, and 30 of 1871, propounded a system of drainage for the City of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments based upon the prospective benefits proposed by the drainage; that the assessment rolls, like the plans preceding them, were to be filed in certain courts, and while these assessments, levied in advance for prospective drainage and benefit to the lands, imported no liability if the drainage failed, and was of no benefit to the lands, the acts providing for the

homologation of the plans, though creating only such provisional liability, should subject the lands to a lien and privilege to secure the cost of the drainage; and that the judgments homologating the assessment rolls, though creating only such conditional liability, should be judgments against the lands and owners thereof, on which execution might issue; that said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other places, or "public things," not subject to taxation, or to assessment for local improvements, or to any form of taxation; that as to the assessments on property owned by private persons, based on prospective or anticipated draining, they were resisted by the owners, on defenses which were sustained by the courts.

Second—A special denial that the assessments on public streets, parks, squares, or other "public things," were, or were ever due or owing; together with a denial that the act of 1871, or any other act, confirmed or made exigible such void assessments; that the inclusion by the said Boards of Commissisoners of the public streets, and places of like character, was illegal; that the act giving the Board of Administrators authority to create the fourth drainage district was unconstitutional, as was held by the Supreme Court of the State of Louisiana in the succession of Patrick Irwin, 33d La. An. Rep., p. 63.

That no judgment of homologation or approval by any court, particularly such as were averred in the bill, could exceed, transcend, or have any greater effect, than the authority contained in several acts, so as to permit or give any validity to assesments for taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner, or to any extent, give validity to any assessments made or taxes levied against public parks, public squares, or other "public things," or to create even the color of a charge of liability against the City of New Orleans.

Third. That the work done by the company and its transferee was defective and insufficient, and that by reason of the defective plan by which it was constructed, its failure was inevitable.

Fourth. That in 1876 the general assembly of the state, by Act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by defendant of the dredgeboats, franchises, and other property of the company, for a price in drainage warrants, payable out of drainage taxes.

Fifth. That there was no obligation imposed on defendant by the act of 1871, or the act of 1876, or in any manner by law, to the warrant holders, or to the payment of warrants, or in respect to the same, save a proper diligence to collect the taxes out which the same

were payable, and apply the collections to their payment, and that the duties thus imposed by the legislature, defendant had fully performed.

Sixth. A denial of any destination by the act of 1876 of the drainage taxes, otherwise than to direct that those collected be applied to pay the warrants, and it was denied that the act of 1876 gave any validity to the void assessments and taxes on public streets, and property of a like character; also, that a single dollar of taxes collected from private property had ever been diverted from drainage warrant holders, the single obligation of defendant being to account for taxes collected; a denial was further made that the city, under the act of 1876, was made the voluntary and contractual trustee for the collection of the same.

Seventh. A denial that prior to the act of 1876, there was imposed upon the city the duties of a trustee for the collection and payment of drainage taxes, or any duty whatsoever, save to account for the collection of assessments on private property; that defendant discharged its full duty under the act of 1876, as to the collection of taxes, the failure to collect many of which was due to the law applicable to the same, as laid down by the Supreme Court of Louisiana; that its efforts to collect were continued and persistent; that all that could be collected had been collected and accounted for.

Eighth. A denial of any neglect of duty with regard to the work of drainage, or its completion.

Ninth. A denial of any failure or neglect to defend suits, brought for the cancellation of drainage taxes.

Tenth. A denial that the acts of the legislature of Louisiana, Nos. 48 and 67, of 1877, and No. 20, of 1882, section 42, were void, as in violation of the constitution of the United States.

Eleventh. That by its bond issue of $1,672,105.21, under Act No. 73, of 1872, if respondent were liable for the assessment on streets, and places of a like character, the same was fully paid by said issue of bonds, which latter was fully known to all drainage warrant-holders, especially to Van Norden; that he, or his assignees or pledgees, were holders of a large amount of drainage warrants redeemed by said bonds; that they were fully apprised of the said bond issue, and the discharge resulting therefrom, and that complainant cannot urge that defendant did not assert said discharge, known in its full scope and effect at all times to Van Norden, and never controverted by him, or any warrant-holder.

Twelfth. A denial that the act of 1876 was in any line or word a recognition of the so-called "drainage fund," as it then stood on the records of the city or mortgage office, and had not been discharged in any manner, etc.

Thirteenth. That the dredgeboats and other property acquired by respondent from the company and Van Norden were of little or no value, and, in any event, infinitesimal as compared with the price paid, and that the sale thereof for the amount paid was a fraud upon defendant and its taxpayers.

Fourteenth. That all taxes collected had been faithfully accounted for; that in the suit of Peake vs. New Orleans, No. ——— of the Circuit Court, defendant had been ordered to render, and had rendered an account of all drainage taxes, and there was no reason to renew the call or order for such account.

Fifteenth. That by the amendment of the Constitution of the State of Louisiana proposed by the general assembly in 1874, and which went into effect January 1st, 1875, the city was prohibited from thereafter increasing its debt in any manner, or from issuing any evidence of debt, or warrant for the payment of money, except against cash in the treasury, the said amendment providing that it should not prevent the issue of drainage warrants, to said Van Norden, transferee of said company, under Act No. 30, of 1871, but payable only from drainage taxes.

That said warrants, by the law of their creation payable only from drainage taxes, never, after that amendment, could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage, the collection of taxes, nor any act or conduct of respondent, nor any act of the general assembly, nor purchase of property under said act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage; nor did said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with said amendment, the price of the property directed by said act to be purchased, could be paid only from assessments on private property, out of drainage taxes alone.

Sixteenth. The defense based upon the decree of the Circuit Court, and of the Supreme Court, in J. W. Peake vs. New Orleans, No. 11,614 of the docket of the Circuit Court, and No. 852 of the October Term of 1890 of this court, which decrees of said courts are *res judicata*.

Seventeenth. That the demands of complainant set up in the bill were barred by the prescription or statute of limitation of five years, established by articles 3540 and 3541 of the Revised Civil Code of Louisiana; also by the prescription or statute of limitation of ten years, established by articles 3544 and 3547 of the Civil Code.

22. That after filing of complainant's replication, and the taking of evidence, the cause came on to be heard in the Circuit Court, and

in March, 1898, the Circuit Court entered a decree in favor of the defendant, dismissing the bill; on March 12th, 1898, complainant was allowed an appeal to the Court of Appeals; that on April 2d, 1898, the case was called for trial in that court, before Judges Pardee and McCormick, Circuit Judges, and Swayne, District Judge; that on May 17th, 1898, the court made a decree, finding:

First. The City of New Orleans a debtor to complainant in the sum of six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, as stipulated in the warrants sued on, to be paid out of the drainage assessments set forth in the bill.

Second. That said assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, were declared to constitute a trust fund in the hands of the City of New Orleans, for the purpose of paying the claims of complainant, and other holders of the same class of warrants

Third. That it be referred to one of the masters of the court, to take and state an account of all said drainage assessments; that in taking such account the master was directed to charge the defendant, as well with the amount of drainage assessments against the city, on the areas of the streets, squares and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected, and properly expended by defendant, in the execution of the trust, but that no offset should be allowed for the bonds issued in exchange for drainage warrants, under the act of 1872.

The opinion of the court was delivered by Swayne, District Judge, and was based upon the following considerations:

First. That the attempt of the answer to fasten the responsibility for alleged defects in the drainage plan upon the Canal Company and Van Norden, as a defense to the action, was entirely unsupported by the evidence.

Second. That the city was a trustee, under the express duty to do whatever was reasonably required to make the drainage fund available; that it was by reason of her own default, in not completing, but abandoning the work, that this was not accomplished; that equity looks upon that as done which ought to have been done; that the city must, therefore, be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand; that the city, under the principles laid down by the Supreme Court of the United States in the present case, was estopped to deny that the assessments upon streets, and other public places, and the judgments thereon, were void *ab initio;* that she was thus estopped to the same extent as she was from setting up the issue of bonds under the act of 1872, as a discharge of

her general liability as trustee, with reference to the fund; that as an original proposition, however, the authorities *seemed* to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of an estoppel.

Third—That by certain decisions of the Supreme Court of Louisiana, it was held, that the City of New Orleans was liable for the assessments made on the area of streets, under statutes similar in all respects to the acts here involved, except that the assessments in the cases cited had not been ratified by the legislature, as had been done in this instance by the act of 1871; that the matter of local assessments had been the subject of judicial inquiry in other states, notably by the Supreme Court of Illinois, where all of the objections raised in the present case had been elaborately considered, and decided in harmony with the case above quoted; that whether the obligation for the drainage assessments had its origin in the original acts of 1858, 1859 and 1861, or was cast upon the city by the act of 1871, confirming the assessment rolls, upon which the city was named as a debtor, or resulted from judgments based on these rolls, the amounts of these assessments constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation, such power being the usual, and in some cases the only, method by which municipal corporations can discharge their indebtedness; citing United States vs. New Orleans, 96 U. S. 381; Wolff vs. New Orleans, 103 U. S. 358.

Fourth. That the constitutional amendment of 1874, which prohibited the city from increasing her debt in any form, or in any manner, or under any pretext, was no defense, the *assumption* to that effect being based on the theory that the assessments against the city were at the time void, and that to now enforce them would increase the city's debt; that the court could not concede the correctness of the argument that the city was not, when the amendment went into effect, the primary debtor of the assessments against private property, and that if the court should now impose a liability on the city for the dereliction of duty charged in the bill, it would create a new debt, which would come within the prohibition; the opinion declared that it was true that the amendment prohibited any increase of the city debt, after January 1st, 1875, but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under act 30, of 1871, payable out of drainage taxes; that it seemed clear to the court that by express terms the amendment excluded, and intended to exclude from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment rolls; that, indeed, it would seem to be that the authority to issue warrants against the drainage fund after that date necessarily implied an affirm-

ance of the right of the city to proceed to the completion of the drainage work then in progress, and to impose a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants, and hence, that these taxes being then liabilities of the city, could not, by any cause or reason, be included in the clause prohibiting the increase of debt, without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution.

Fifth. That even admitting that the purchase created a debt in excess of the limitation, the most that could be said was that it made an error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another.

Sixth. That the only remaining question which required consideration was the plea of prescription, which the court thought could not be maintained, for the reason that the act of sale created an express trust, in which the city undertook as a trustee to collect and apply the drainage assessments to the payment of warrants for the price of the property sold it; moreover, that it was doubtful whether statutory assessments of the character in question were subject to any prescription at all.

23. From this decree the City of New Orleans obtained an appeal to this Honorable Court, which was, on the 20th day of October, 1898, dismissed, on the authority of Union & Planters Bank vs. Tennessee, 152 U. S., p. 454, and Sawyer vs. Kochersberger, 170 U. S. 303.

24. That it having thus been established, that no appeal lies to this court from the Court of Appeals, your petitioner is moved to apply to this court for a writ of certiorari in the premises.

That your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it, for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An Act to Establish the Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, the said case being made final in the said Circuit Court of Appeals by said act.

25. That the questions involved in this case are of great gravity and importance; that upon its correct determination depends the liability *vel non* of the defendant for three hundred thousand dollars, with eight per cent. interest per annum from June 6th, 1876, which would amount, at the present time, to a sum in excess of eight hundred and

twenty-eight thousand dollars, the question of liability being governed by nice and difficult questions of law and fact, which have been misapplied, or not fully understood by the Court of Appeals.

26. That the case was decided in said Court of Appeals, and all of petitioner's defenses, save one—that of *res judicata*, which was not decided at all, nor even mentioned in the opinion,—overruled upon the supposed authority of the opinion of this Honorable Court in Warner vs. New Orleans, 167 U. S. 467; that as a matter of fact, of the numerous defenses set up by petitioner's answer, only one was presented and involved in the case mentioned, and that presented in manner, form and conditions, differing *in toto* from that involved in Warner vs. New Orleans, 167 U. S. 467.

27. That in said case there were certified to this Honorable Court two questions alone, the first, being whether the city was estopped to plead her bond issue as a payment of her obligation for drainage taxes collected, or which it failed to collect, and of its liability as assessee of streets and other public places; the second, whether the present case was governed by the decision of your Honors in Peake vs. New Orleans, 139 U. S. 342; that the first question this Honorable Court answered in the affirmative, and declined to answer the second at all; hence, the assumption of the court, in the first sentence of its opinion, that, "as to nearly all of the defenses raised, we might well rest our decision on the opinion of the Supreme Court, expressed in answer to the certified question," is unfounded.

28. That the court erroneously held, that under the principles laid down by your Honors in the case above mentioned, that the city was estopped to deny the existence and validity of the assessments against it, as *quasi* owner of streets and other public places, to the same extent that it was estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to that fund, and that whether it be true or not, as the court declares, that the authorities *seem* to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel, it is beyond question that the acts of 1858, 1859 and 1861, under which the assessments were levied, did not contemplate the liability of public property therefor, but were intended to include private property alone; that the language of these statutes would clearly place the assessments on public property in question beyond the reach of the principle which the court declares *seemed* to be affirmed by the authorities.

29. That the decisions of the Supreme Court of Louisiana cited in the opinion to sustain the proposition that streets, and property of a like character, were liable to assessment, are all based upon special statutes, presenting no feature in common with those involved here, as concerns the questions at issue.

30. That the court erred in holding that the constitutional amendment of 1874, prohibiting the city from, in any form or in any manner, or under any pretext, increasing its debt, was an authority for, instead of a prohibition against, any increase of debt; that the authority therein contained to draw drainage warrants, payable out of drainage taxes, which the court says necessarily implied an affirmance of the right to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty upon the city to collect and apply all drainage assessments to the payment of warrants, was neither justified nor excused by anything contained in the amendment; the authority to draw the warrants, payable out of drainage taxes alone, following the prohibition of increasing her indebtedness, gave point and emphasis to the latter; the supposed necessary implication, of an affirmance of the right of the city to proceed to the completion of the drainage work which was then in progress, is overborne by the fact that such work was then being conducted not by the city, but by the Canal Company and Van Norden, the city having no connection with it at all, until after its purchase in 1876, about two years and a half after the amendment was proposed.

31. That the court was mistaken in declaring that the question of prescription was the only one remaining, after having disposed of those mentioned, it having left unnoticed the plea of *res judicata*, set up in the answer; that the prescriptions were that of five years established by article 3540 of the Revised Civil Code of Louisiana, applicable to all effects negotiable or transferrable by endorsement or delivery; that of ten years established by article 3544 of the Revised Civil Code, applying to all personal actions, of any character whatsoever; that of ten years established by article 3547 of the Revised Civil Code, applying to all judgments.

That all these pleas of prescription were overruled by the court, on the single ground that the act of sale created a trust, under which the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, a ground wholly untenable in Louisiana law, under which, by article 3530 of the Revised Civil Code, to enable a debtor to claim the prescription which operates as a release from debt, it is not necessary that he produce any title, or hold in good faith, the neglect of the creditor alone operating a prescription in such case, and under article 3550, that good faith is not required on the part of a person pleading this prescription; that these two articles, and that, barring all personal actions by the lapse of ten years, would apply to that part of complainant's bill which sought to hold defendant responsible for its noncollection of assessments due on private property; that the prescription of ten years, by which judgments are extinguished, established by article 3547 of the Revised Civil Code, would have direct application to judgments for

drainage taxes against the city herself; that as to these judgments she was not a trustee, but a debtor; that she was charged with no duty of saving them from prescription by suits for their revival, as, in any event, it was legally impossible for her, as plaintiff, to institute a suit against herself, as defendant, for their revival, while article 3547 left with complainant, and those similarly situated, the power, by timely suits for reviving the same, to save such judgments from extinguishment by prescription, the said article allowing any one interested in a judgment to bring a suit for its revival.

32. That besides the numerous defenses set up in the defendant's answer, only three of which are noticed in the opinion of the Court of Appeals, namely, that the drainage plan of the Canal Company was fatally defective, and could never furnish the basis for a successful drainage system, that the streets, public squares, etc., were not liable to assessment, and the plea of prescription; defendant pleaded the defense of *res judicata*, based upon the decree of the Circuit Court, and of this Honorable Court, in the case of Peake vs. The City of New Orleans; that if this plea was well founded, it would have extended the whole length of plaintiff's bill, and would have completely barred all the relief it sought; that the plea was based upon the fact that in the said case of Peake, James Jackson appeared, by intervening bill, as the holder of five purchase warrants identical in character with those sued upon by the complainant, namely, part of those given in payment of the price of the city's purchase of dredgeboats, etc., from the Canal Company and Van Norden; that the decree in the Peake case was a dismissal of complainant's bill, and of all intervening bills; that the decree upon the warrants sued on by Jackson was decisive of the status of the whole series of purchase warrants.

That this plea of *res judicata* was not mentioned by the court in its opinion, on account of which it may be said that it was not considered, and if so, defendant has had no hearing upon this branch of its case.

33. That the court was grossly in error in decreeing that the city was the absolute debtor of the drainage warrants sued upon; that all the bill sought to do was to obtain an accounting of the drainage taxes; that in no event were the drainage warrants sued upon to be considered unconditional obligations of the city until it was shown that all of the taxes had been lost, misappropriated or misapplied by the city, even if then, which is denied.

34. That in the Circuit Court of Appeals, as part of its petition for a rehearing, defendant filed an assignment of errors for the purposes thereof; that it was in words and figures as follows, to-wit:

First. That this Honorable Court, the United States Circuit Court of Appeals for the Fifth Circuit, is and was without jurisdiction to hear and determine this cause; that the case involves the construc-

tion and application of the constitution of the United States, especially section 10 of article 1, and also the 14th amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the constitution of the United States, to-wit: that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the general assembly of the State of Louisiana, No. 48, of the year 1877, excluding certain lands from all liability for drainage taxes and cancelling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the general assembly of the State of Louisiana, No. 67, of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of Act No. 20 of the general assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the City of New Orleans or portions thereof and the collection of drainage tax assessments are unconstitutional, null, and void because repugnant to the constitution of the United States, especially section 10 of article 1 and the 14th amendment of that constitution, prohibiting all state legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner vs. City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*, that while the case of Peake vs. City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope; in any event

the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata*.

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An. 338; Marquez vs. City of New Orleans, 13 An. 319; Correjolles vs. Succession of Foucher, 26 An. 362; Barber Aphalt Paving Co. vs. Gogreve, 41 An. 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean vs. City of Bloomington, 106 Ill. 209.

Eighth. That the court erred in holding that the asssesments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under Act No. 30, of 1871, and by no interpretation could be held to include warrants issued under the subsequent Act No. 16, of 1876; that the said assessments against public property were not confirmed by Act No. 30, of 1871, such confirmation as may have been given by said act having reference ex-

clusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the state of Louisiana; that the statutes of limitations of the several states and the interpretation given them by the highest court of the state in question are binding as rules of decision in the federal courts; that the laws of prescription of the State of the Louisiana and their construction given by the Supreme Court of this state, so far as they operate as a release from debt, depend for their appplication solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute without further condition constitutes a complete defense; hence, even if the city, as erroneously held by your Honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company vs. Pike, 32 An. 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is

error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant, to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival, so that it is the warrant-holders, and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An. 1037; McKnight vs. Calhoun, 36 An. 408, to the effect that the prescription of debts due by a succesion to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made, are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character; that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed vs. His Creditors, 39 An. 115, citing State vs. Jackson, 34 An. 178, and Davidson vs. Lindop, 36 An. 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by those cases, differing *in toto* from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue."

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the Circuit Court for the Fifth Circuit and Eastern District of Louisiana, in the case of James W. Peake vs. City of New Orleans, No. 11,614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opin-

ion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employees, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record; the bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence, was a diminution of the outstanding drainage fund; and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, at shown by your Honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake vs. New Orleans, 139 U. S. 342, the Supreme Court held that the city had the right to abandon the work of drainage—that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense, the court erred.

Fourteenth. That the court erred in holding that the City of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest from January 6th, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of

sale from Warren Van Norden, transferee, to said city, under the authority of Act 16 of the legislature of the State of Louisiana, approved February 24th, 1876.

Sixteenth. That the court erred in holding that the city in any mode, should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city, in any event, for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the general assembly of the State of Louisiana, Nos. 48 and 67, of 1877, and section 40 of Act No. 20, of 1882, were full and complete authority and justification of the City of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

That this assignment of errors, petitioner prays this court to take and consider as its assignment of errors, along with errors set out in this petition, as an assignment of errors for the purposes of this petition.

35. The court was also in error in allowing interest at eight per cent. per annum upon the warrants sued upon from June 6th, 1876, making over twenty-two years, which would amount now to over one hundred and seventy-six per cent.; that neither act No. 16 of 1876, nor the contract of sale thereunder, provides for the payment of interest, and the stipulation for the payment of interest contained in the warrants was without authority of law, the administrators of accounts and finance having no power to exceed the statute, and the contract, under which the warrants were issued.

36. That whether or not the said plea of *res adjudicata* was well founded, is to be determined by the scope and effect of the finding and decision of this court in the said case of Peake vs. New Orleans; that the proper construction of your Honor's decision in that case is a subject peculiarly within the supervisory power of this court; and that such power should be here exercised in the interest of jurisprudence and uniformity of decision, and as well also in furtherance of justice.

37. That the contract upon which is founded the liability sought to be established against the city, was grossly unfair and inequitable in reference to the latter; that the dredgeboats, derricks and other property, sold to the city in 1876 for three hundred thousand dollars, payable in drainage warrants, had been acquired by Van Norden from the Canal Company in 1872 for fifty thousand dollars; that during the intervening time, the boats and other drainage paraphernalia had been in almost constant use, and, from the averments of the bill as to the number of canals dug and levees built, it is evident that they were worked to their utmost capacity; that this in no sense tended to increase their value, as placed upon them by Van Norden and the Canal Company in the purchase from the latter by the former in 1872; that this, notwithstanding, the same property was sold to the city by Van Norden in 1876 for an amount in drainage warrants exceeding by five times the sum which he had paid for them nearly four years previously.

Your petitioner thus respectfully submits, that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the Court of Appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays, that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled John G. Warner vs. City of New Orleans, No. 691, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

NITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Walter C. Flower, being duly sworn, deposes and says: That he the Mayor of the City of New Orleans, defendant in the suit of John Warner vs. the City of New Orleans, No. 691 of the docket of the nited States Circuit Court of Appeals for the Fifth Circuit; that he s read the forgoing petition, and the facts therein stated are true the best of his knowledge and belief.

NITED STATES OF AMERICA,
STATE OF LOUISIANA.
CITY OF NEW ORLEANS.

Samuel L. Gilmore, being duly sworn, deposes and says: That is City Attorney of the City of New Orleans; that as such he had rsonal charge for the said city of the case in the foregoing petition ntioned, in the United States Circuit Court of Appeals for the Fifth rcuit; that he has read the said petition, by him subscribed, and e facts therein stated are true, to the best of his knowledge and ief.